82-767

No.

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DR. NATHANIEL L. WILLIAMS,

Petitioner,

v.

VISION CARE SERVICE, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME SHUMAN
Counsel for Petitioner
1630 Juniper Street, N.W.
Washington, D.C. 20012
(202) 686-6412

QUESTION PRESENTED:

Whether it is a violation of the anti-trust laws for a corporation to enter contracts with membership organization to provide vision care services to the members of those organization through independent optometrists setting the maximun price that the member optometrists may charge the member patients, and imposing other restraints that in other industries have been held to be violations of the anti-trust laws?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 5, 1982.

OPINIONS BELOW

The opinion and order of the United States District Court for the District of

Columbia was rendered on January 19, 1981, and the order was filed on January 30, 1981, granting defendant's motion for summary judgment. The district court did not write an opinion. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 4, 1982, and the order of the Court of Appeals denying the petition of rehearing and rehearing en banc was entered on August 5, 1982, a copy of the order appears in Appendix a5.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 4, 1982, a timely petition for rehaearing and rehearing en banc was filed and an order denying the petition was filed August 5, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of sections one and three of the Sherman Act, 15 USC §§1,3, and section three of the Clayton Act, 15 USC §14 appear in Appendix a1 hereto.

The respondent, Vision Care Services, Inc., (V.C.S.) is a corporation that was established and is operated by a group of approximately twelve optomertists who practice in the Washington, D.C., Baltimore, Maryland, Central Maryland, and Northern Virginia areas. This corporate entity does not provide any vision care services itself. It enters contracts with organizations that are interested in providing visual care to their members to make visual and optical services available to them through optometrists who have been approved by Vision Care Services, Inc. At the time relevant to this case Vision Care Services, Inc., had contracts with some thirty or more organizations.

In order for a doctor to be approved by Vision Care Services, Inc., he had to agree to abide by certain restraints with respect to the source of his supplies and materials, and with respect to the price he

would charge patients who received care pursuant to their relationship with an organization with whom Vision Care Service had a contract.

Source of Supply

With respect to the source of supply, the contracts between Vision Care Services and the doctors on the approved list provided that (1) all materials must be American made and supplied, (2) all materials used must be invoiced from an optical laboratory approved by Vision Care Services, and (3) only American made frames may be used. To enforce these requirements the contracts provided that "payment will not be made for materials from any other source unless prior authorization is obtained from the Board of Directors of V.C.S.

Price Fixing

The contracts contained four sig-

nificant price fixing restrictions. Two of these related to patients who received services that were encompassed within the scope of Vision Care Services's contract with the contracting organization. The other two applied to services by the doctors to patients who were affiliated with contracting organizations but who were receiving services that were not covered by the program.

With respect to services in the first category, the doctors were not permitted to charge more than the maximum amount set by Vision Care Services for the service. This restriction applied even if the patient were willing to pay the difference between the amount set by Vision Care Services and a higher amount charged by the doctor for the services. The contracts explicitly provided that "the doctors will consider the

payments by V.C.S. as payment in full for all authorized services and will not bill the patient for any part thereof."

An additional price restriction was placed on the doctors based on the price charged other patients. If the maximum allowed by V.C.S. was higher than the usual and customary fee charged to other patients he could not charge more than the usual and customary fee charged to other patients. To enforce this price restriction V.C.S. made investigative inquiries to find out the amount charged other patients.

If the doctors rendered services to patients that were not covered by the V.C.S. program, such as providing sun glasses or other special glasses, the doctors were subject to two price fixing restrictions. (1) The materials (lenses,

frames, etc,) acquired from a laboratory had to be resold to the patient by the doctor at the doctor's cost. (2) The fee charged by the doctor for his services had to be the exact fee set forth on an itemized fee schedule provided by V.C.S.

Other Restraints

Each doctor must warrant to V.C.S. that he is not and will not become a member of "any other group vision care program or similar organization unless specifically authorized by the Board of Directors of V.C.S.

V.C.S. actively sought to prevent the participation of its approved doctors in any other "group vision care program" as per section 8-D of the V.C.S. Doctors' Manual and as set forth in a V.C.S. Quarterly News Letter for January 1976 (see appendix).

All frames as well as all other materials and supplies used by the doctors

on the V.C.S. approved list are explicitly required by the contract to have been made in America.

Between November 7, 1972 and January, 1977, Dr. Williams was on the V.C.S. approved list. Prior to his termination he was subjected to the contractual restraints listed above. Throughout the time he was involved in the program, Dr. Williams lost money due to the imposition of these restrictions. He consistently submitted invoices and was denied payment of the amount charged for his services because V.C.S., based on its investigations felt that the amount charged were more than the usual and customary fee charged to other patients. Dr. Williams also lost money by not being free to use the laboratory of his choice. This hardship continued until for economic reasons he started to use laboratories that were

not approved by V.C.S.

The district court below in granting Vision Care's motion for summary judgment did not make specific findings as to which facts it regarded as not material and in dispute and which it regarded as material an not in dispute. The court gave no indicatiion of its views on the applicable law. The court simply said "the court is of the view that there are no genuine material facts in dispute and the court will grant summary judgment."

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE RECENT DECISION OF THIS COURT IN ARIZONA, PETITIONER v. MARICOPA COUNTY MEDICAL SOCIETY ET AL., 102 S. Ct. 2466 (1982). IN THAT CASE IT WAS HELD THAT PREPAID MEDICAL PLANS ARE ARE NOT IPSO FACTO IMMUNE FROM THE ANTITRUST LAWS AND THAT AN AGREEMENT UNDER WHICH MAXIMUM FEES WERE SET FOR DOCTORS WAS A PER SE VIOLATION OF THE SHERMAN ACT.

The facts of this case clearly disclose that Vision Care Services is in reality a cartel through which the contracting organizations fix the price of optical services and materials (lenses, frames, etc.) for their members. There are price fixing agreements between V.C.S.

and the contracting organizations with respect to the amount the doctors will be able to charge their patients who are members of their organizations. V.C.S. does not contract to serve patients itself. As a non-profit corporation, it is not a competent professional qualified to provide services to patients. Moreover, the contracting organizations with which it enters the agreements are neither patients nor potential patients. The individual members of the contracting organizations are the patients. It is the individual member of the contracting organizations who in reality ultimately pay for the services they receive from the doctors. Even when they do not do so directly, they do indirectly in the form of organizational dues or by providing their labor in exchange for an employment package where the program is offered as a

"fringe benefit" in partial exchange for their labor.

One test that this Court has applied to determine the relative rela tionship of the parties to a restraint is the risk of loss test. The Court used that test in Simpson v. Union Oil Co. of California, 377 U. S. 13 (1964). In that case, Union Oil Company imposed price restraints on Simpson and other gasoline dealers. In order to attempt to shield the arrangements from the per se rule Union Oil Co. reserved the title to the gas in itself until it was sold to the ultimate consumer. Union Oil Co. entered consignment agreements with the dealers. Under the consignment agreements, Union Oil Co. set the price at which the gas could be

sold, kept "title", to the consigned gas and paid the property tax on the gas possessed by the dealers. The dealers were required to carry personal liability insurance and property damage insurance and were responsible for any loss of the gas in their possession. The dealers were compensated by minimum commissions and paid all costs of operation. The court held the arrangement to be unlawful price fixing in disguise. The dealers bore the real risk of loss. There was no ligitimate reason to reserve title. The court recognized that there are legitimate uses for consignment contracts. However, it pointed out that:

> No matter how lawful it might be as a matter of private contract law it must give way before the federal antitrust policy. Thus, a consignment is not allowed to be used as a cloak to avoid § 3 of the Clayton Act . . . . Nor does § 1 of the Sherman Act tolerate agreements for retail price maintenance.

In the present case, Vision Care Ser-

vices would try to convey the impression that it has created a contractor-subcontractor relationship. However, when the risk of loss test is applied, V.C.S.'s arrangements are clearly revealed as price fixing schemes. The risk of loss for the program was on the doctors, not on V.C.S. V.C.S. withheld 20% of the doctors' fees "for the possible contingency of poor experience on claims utilization." In other words, the risk of a poor business judgment was to be borne by the doctors and not by V.C.S. This money was held for a period of three months after termination of the contract between V.C.S. and the contracting organization, thus providing V.C.S. a sufficient insulation against loss. The doctors were required to carry professional liability insurance, V.C.S. was not.

A good indication of the dominant concern that V.C.S has with pricing is the fact that it places a restriction on the

prices that the doctors can charge for services and materials not related to its program. It requires the doctors to sell their materials at costs and provide their services at the amount set out in the fixed fee schedule established by V.C.S. It is well established by the decisions of this Court that fixed fee schedules even for professionals are unlawful. See, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In the present case it is clear that V.C.S. has no independent interest to protect by the imposition of the restraints in question. Then whose interest is it protecting? The answer is obvious. It is that of the contracting organizations and their members. The restraints are horizontal with a vertical facade.

This Court in an analogous situation applied the "whose benefit test" and held that the ostensible vertical arrangement was really a horizontal restraint with

a vertical facade. United States v. General Motors Corp., 384 U.S. 127 (1966). In this case, General Motors had location clauses in its dealer contracts. One dealer was selling cars through discount lots and selling more cars. General Motors tried to stop him. This Court found that General Motors did not have an interest to protect by the location clauses. It was really enforcing those clauses for the benefit of the dealers. Thus General Motors in that instance was functioning as a cartel for a horizontal restraint, just as V.C.S. is doing in the case presently before this Court.

The program structure in this case is strikingly similar to that which existed in the case of United States v. Sealy, Inc., 388 U.S. 350 (1967). In Sealy, the corporation was established with power to determine the price at which its mem-

bers would sell mattresses. This Court held that the arrangement was a horizontal price fixing agreement and was therefore per se unlawful.

II. THE GRANT OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS CASE WAS INCONSISTENT WITH AND INCOMPATIBLE WITH THE PRINCIPLES THAT THIS COURT HAS SET FORTH FOR SUMMARY JUDGMENT IN ANTITRUST CASES.

Even if one were to assess the validity of the restraints imposed by Vision Care Services on Dr. Williams and the other doctors who participated in the program by getting on the approved list in terms of the "rule of reason" rather than the per se rule the defendant still should not have been granted summary judgment. Under the rule of reason there should at least be an inquiry with respect to

power, purpose and effect. It was patently clear in this case that because of the large number of contracting organizations, the large number of doctors (approximately 266) on V.C.S. approved list, and the dollar volume of business effecting commerce that the trade restraints were at least quantitatively substantial. See, Standard Oil of Calif. and Standard Stations, Inc. v. United States, 337 U.S. 293 (1949). Yet there was no evidence relating to the reasonableness of the restraints, the reason for the restraints or any other relevant factors under the rule of reason. This was not done and probably could not have been adequately done on a motion for summary judgment because the consideration and resolution of such matters are suitable for trial and not summary judgment.

This Court has pointed out that sum-

mary judgment motions should be treated cautiously in antitrust cases. In Poller v. Columbia Broadcasting System, 388 U.S. 464 (1962), the leading case on summary judgment in antitrust cases, a summary judgment had been entered favor of the defendant. In doing so this Court stated the following:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only where the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' Id. at 473.

Where the legality of conduct turns on such factors as intent, reasonableness and effect, there must be interpretations of complicated and extensive evidence. This can generally be elicited only at trial. As was pointed out in Modern Home Inst. v. Hartford Accident and Indem. Co.,

573 F2d 102, 109 (2nd Cir. 1975) it is a rare case where the evidence available to both sides is fully explored before trial and where the alleged conspirators can establish that the evidence is not susceptible of the inferences.

The effect of granting the defendant's motion for summary judgment in a case such as this is to hold the restraints involved per se lawful. This point can be illustrated by an examination of one of the restraints in this case other than those that have held by this Court to be per se unlawful, such as price fixing.

V.C.S. requires the doctors to agree to buy all their materials, i.e., lenses and frames, etc., only from the laboratories approved by V.C.S. This restriction is in restraint of trade. It clearly has the effect of foreclosing competition in the optical industry, depriving the doctors of

the right to reach professional business decisions and depriving patients of another choice in the market place. The only question is whether a finder of fact would determine such a restraint to be reasonable or unreasonable under the Sherman Act or to have a substantial or an insubstantial effect on commerce under the standard of the Clayton Act. In no event should such a restraint be held ipso facto lawful on a motion for summary judgment. See, White Motor Co. v. United States, 372 U.S. 253, (1963), where this Court held that it was error for the district court to have decided the question of the legality of a group of vertical restraints on a motion for summary judgment. This Court said "we know too little of the actual impact . . . to decide on the bare record of a summary judgment."

Restraints on the source of supply are neither per se lawful nor per se un-

lawful. In each instance the legality must be determined by an evaluation of power, purpose and effect. This cannot be done on a motion for summary judgment. The case of Copper Liquor, Inc. v. Adolph Coors Co., 506 F2d 934 (5th Cir. 1975) was a case where the court rejected the quality control argument asserted in defense of a restraint on dealers. The Adolph Coors Company argued that its territorial limitations were reasonably necessary to provide monitoring to ensure that beer bearing its name was brewed in an "aseptic process rather than pasteurized, was properly refrigerated and that beer even sixty days old was removed from the market." In rejecting this defense the court said: "we think that the present record would not support the conclusion that the ... restrictions are essential to the integrity of (the) pro-

duct and the survival of the firm." Id. 944. A comparison of Clairol, Inc. v. Boston Discount Center, 608 F2d 1114 (6th Cir. 1979) with Clairol, Inc. v. Comsmetic Plus 130 N.J. Super. 81 (1974). In the first cases the court upheld the "safety first" position for the restriction; in the other it rejected it.

In a case such as the present case where there are already governmental standards applicable to the industry, and where the party imposing the restraint has no interest in the product, V.C.S. would have a heavy burden to carry in supporting its vague contention that this restriction is reasonable as applied and used by it. The V.C.S. procedure for the approval of laboratories was simply to request the laboratories to send V.C.S. price lists through the mail. V.C.S. then made its de-

termination based on these lists. V.C.S. does not engage scientists, experts or any one else to ascertain the quality of the materials used by a given laboratory under consideration. V.C.S. does not have anyone to monitor the accuracy of the products produced by any of the laboratories. Based on V.C.S.'s lack of standards it would appears that any laboratory meeting the standards of the Food & Drug administration and the National Bureau of Standards should be allowed to sell their wares to the doctors on the V.C.S. list.

III. THE DECISIONS OF THE LOWER COURT IS IN CONFLICT WITH A LONG LINE OF DECISIONS OF THIS COURT HOLDING THAT GROUP BOYCOTTS AND CONCERTED REFUSAL TO DEAL ARE UNLAWFUL PER SE.

In Klor Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959) it was pointed out by

this Court that when a group of competitors (two or more) agree not to deal with a person or firm outside the group or to deal only on certain terms, there is a combination in restraint of trade violating section one of the Sherman Act.

In Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) pointed out that a group boycott--like price fixing--is deemed inherently harmful to the economy and thus cannot be justified.

In this case the V.C.S. imposed restrictions that all the frames, other materials, and supplies used by the participating optometrists had to be American made which automatically meant that certain supplies had to be boycotted by the participating optometrists. Futhermore, the restrictions which prohibited participating optometrists from offering their services to

other "pre-paid vision care programs, automatically means that there is an agreement to boycott and a concerted refusal to deal. Therefore, the aforementioned restrictions in this case should be held to be per se violations of the Sherman Act, in accordance with previous decisions of this Court.

CONCLUSION

The decisions by the District Court and the Court of Appeals in this case are reminisce of other cases that have had to come before this Court in order for it to reiterate that there is no professional exemption from to the antitrust laws. It appears that when the Court decides the proposition in one professional context, the problem is later presented in another professional context. In the past the Court has performed the task with respect to the medical profession, the the legal profession, and the legal profession, among others. The problem has also been attacked by the Justice Department with respect to professional engineers and certified accountants. The professional exemption concept appears to be like Hydra, a multifarious monster which cannot be overcome by a single effort. Each time this Court cuts it down in one professional con-

text it springs up in another. However, just as Hercules was able to finally slay the evil nine headed monster in Greek mythology by cutting of each head and cauterizing the wound, this Court is called upon to perform a Herculean task, of finally ridding the antitrust field of the professional exemption concept. Therefore, we now ask that this Court reiterate its position in the context of the optometrist profession and cauterizing yet another wound.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

DATED: November 3, 1982.

Respectfully submitted,

JEROME SHUMAN
1630 Juniper Street, N.W.
Washington, D.C. 20012
(202) 686-6412